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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA
AT ANCHORAGE**

BRISTOL BAY ECONOMIC
DEVELOPMENT CORPORATION, *et al.*,

Plaintiffs,

v.

MICHELLE PIRZADEH, in her official
capacity as Regional Administrator of the U.S.
Environmental Protection Agency Region 10,
et al.,

CASE NO. 3:19-CV-00265-SLG

CASE NO. 3:19-CV-00265-SLG (CONSOLIDATED) - 1

<p>Defendants,</p> <p>and</p> <p>Intervenor-Defendant.</p>	
<hr/> <p>SALMONSTATE, <i>et al.</i>,</p> <p>Plaintiffs,</p> <p>v.</p> <p>MICHELLE PIRZADEH, in her official capacity as Regional Administrator of the U.S. Environmental Protection Agency Region 10, <i>et al.</i>,</p> <p>Defendants.</p>	CASE NO. 3:19-CV-00267-SLG
<hr/> <p>TROUT UNLIMITED,</p> <p>Plaintiffs,</p> <p>v.</p> <p>MICHELLE PIRZADEH, in her official capacity as Regional Administrator of the U.S. Environmental Protection Agency Region 10, <i>et al.</i>,</p> <p>Defendants.</p>	CASE NO. 3:19-CV-00268-SLG

JOINT PROPOSAL FOR FURTHER PROCEEDINGS

In response to this Court’s Order that required the parties to “file a joint proposal or separate proposals as to the scheduling of further briefing and/or proceedings in this matter,” ECF 83, the parties propose that this Court establish a schedule, set forth below, for briefing Defendants’ motion for remand with vacatur. Defendants plan to file the motion because, *inter alia*, EPA did not address the standard that the Ninth Circuit has determined must be applied when withdrawing a proposed determination under Clean Water Act section 404(c), 33 U.S.C. § 1344(c), which is the action challenged here. Counsel for

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Plaintiffs and for Intervenor-Defendant State of Alaska have authorized undersigned counsel to represent that Plaintiffs and the State join in this proposal.¹ In further support of this proposal, Defendants state as follows.

1. On December 10, 2019, Defendants moved to dismiss this case. ECF 36. In that motion, Defendants acknowledged that EPA Region 10's notice of withdrawing the proposed determination, *see* 84 Fed. Reg. 45,749, 45,756 (Aug. 30, 2019), stated that the Agency was not basing its decision on technical judgments about whether the mine proposal addressed in the proposed determination would result in an "unacceptable adverse effect." *Id.* at 14-15.

2. On March 20, 2020, Defendants filed their merits brief in this matter. ECF 64. In that brief, Defendants again acknowledged that, in making the challenged withdrawal decision, EPA Region 10 had not made any judgments about whether the mine proposal would result in an "unacceptable adverse effect." *Id.* at 11.

3. On April 17, 2020, this Court granted Defendants' motion to dismiss and entered final judgment dismissing the case. ECF 75, 76.

4. On June 17, 2021, the United States Court of Appeals for the Ninth Circuit affirmed in part and reversed in part. The Ninth Circuit remanded the matter for further proceedings to determine whether EPA's challenged withdrawal of its proposed determination was "arbitrary, capricious, an abuse of discretion, or contrary to law, 5 U.S.C. § 706(2)(A)." *Trout Unlimited v. Pirzadeh*, 1 F.4th 738, 760 (9th Cir. 2021).

¹ The parties do not waive, and expressly reserve, their arguments regarding EPA's authority under Clean Water Act section 404(c), 33 U.S.C. § 1344(c), in this matter.

5. More specifically, the Ninth Circuit ruled that, under EPA’s regulations, the EPA Regional Administrator may “withdraw a proposed determination only if the discharge of materials would be *unlikely to have an unacceptable adverse effect*.” *Id.* at 757 (emphasis added).

6. On August 12, 2021, this Court issued an Order that requires the parties to “meet and confer, and within 14 days of the date of this order, file a joint proposal or separate proposals as to the scheduling of further briefing and/or proceedings in this matter.” ECF 83. This Court subsequently extended the deadline for proposal(s) to September 10, 2021. ECF 85.

7. EPA acknowledges that it did not address the standard that the Ninth Circuit subsequently determined must be met for withdrawal of a proposed determination.

8. Accordingly, Defendants plan to file a motion for remand with vacatur. Defendants propose that this Court establish the following schedule for briefing that motion:

September 28: Defendants’ motion for remand with vacatur due;

October 12: Responses to motion for remand with vacatur due;

October 19: Defendants’ reply in support of motion for remand due.

9. As mentioned above, Plaintiffs and the State of Alaska join this proposal.

Respectfully submitted this 9th day of September 2021.

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